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No. 86 – 1343

IN THE

Supreme Court of the United States

October Term, 1986

ROBERT JAMES TAFOYA,
Petitioner,

v.

NEW MEXICO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the introduction of videotaped testimony of child victims of sex offenses satisfies the Confrontation Clause of the Sixth Amendment to the United States Constitution.

1. Did the videotaped depositions in this case, in which the witnesses were sworn, Petitioner's counsel cross-examined, the jury observed demeanor, and Petitioner had full audio and visual contact with his attorney and the testimony, satisfy the purposes of the Confrontation Clause?

2. Did the New Mexico Court of Appeals correctly balance the rights of Petitioner with policy considerations involved in presenting the testimony of child victims of sex offenses?

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RESPONDENT'S BRIEF IN OPPOSITION

The State of New Mexico, Respondent, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the denial of a petition for writ of certiorari in the New Mexico Supreme Court and of the Opinion of the New Mexico Court of Appeals in this case.

STATEMENT OF THE CASE

Petitioner was convicted on twenty-three felony counts stemming from a series of sexual assaults in Albuquerque's Northeast Heights area in the fall of 1984. He was sentenced to 201 years in prison, of which 100 years were suspended. On appeal, the New Mexico Court of Appeals affirmed and the

New Mexico Supreme Court denied a petition for writ of certiorari.

The victims in this case consisted of six female children ranging in age from four to eleven years and one female adult. Pursuant to N.M. Stat. Ann. § 30-9-17 (Repl. Pamph. 1984) and N.M.R. Crim. P. 29.1 (Repl. 1985) (current version at N.M.R. Crim. P. 5-504 (Recomp. 1986), the State moved prior to trial to present the testimony of the child victims by videotaped deposition. A hearing was held at which experts in child psychology and the childrens' parents testified. The evidence developed at this hearing established that the children would suffer unreasonable and unnecessary mental or emotional harm by testifying either in the same room as the alleged offender, or in open court. The court granted the motion with respect to five of the six children. The sixth child and the adult victim testified in open court in the same room as Petitioner.

The depositions were obtained in the courtroom at the University of New Mexico School of Law. Present at these depositions were the prosecuting attorneys, Defense Counsel, the trial judge, who presided, and, in each case, a non-related adult who served as a supporting person and who sat in the spectator section of the room. Defendant was seated in a control booth adjacent to the courtroom which contained a one-way mirror into the courtroom, but the mirror was partially blocked by electronic equipment. The courtroom was designed specifically for videotaping and provided sufficient audio-visual equipment. Television monitors in the control booth provided Petitioner with complete observation, both audio and visual, of the proceedings. In addition, both he and Defense Counsel were equipped with headsets and microphones for two-way communication, and the trial judge was in communication with the control room. The entire setup was disclosed to each of the child witnesses, and, as a practical matter, they could see Defense Counsel communicating by headset with Petitioner. Defense Counsel conducted extensive cross-examination of each of the witnesses.

ARGUMENT

1. The Videotaped Depositions Satisfied the Purposes of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Petitioner challenges only the restriction on actual, physical, face-to-face confrontation with the witnesses. He does not otherwise contest the procedure of videotaping the witnesses' testimony. That procedure was upheld by the New Mexico Court of Appeals in the case of *State v. Vigil*, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985). The State contends that the physical separation of Petitioner and the witnesses did not violate the Confrontation Clause of the Sixth Amendment. The purposes of that clause, as developed by decisions of this Court, were completely satisfied by the procedure adopted in this case.

This Court identified the purposes behind the Confrontation Clause in *California v. Green*, 399 U.S. 149 (1970). It was said that confrontation

> (1) insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. at 158. These interests were recently reaffirmed in *Lee v. Illinois*, 476 U.S.___, 90 L.Ed.2d 514, 526, 106 S.Ct. 2056 (1986). This Court further indicated in *Douglas v. Alabama*, 380 U.S. 415 (1965) that "an adequate opportunity for cross-examination may satisfy the [confrontation] clause even in

the absence of physical confrontation." *Id.* at 418. The Court has consistently reaffirmed this principle. *Ohio v. Roberts,* 448 U.S. 56, 63 (1980); *Davis v. Alaska,* 415 U.S. 308, 315-16 (1974); *California v. Green,* 399 U.S. 149, 156-58 (1970); *Bruton v. United States,* 391 U.S. 123, 126 (1968); *Pointer v. Texas,* 380 U.S. 400, 406-07 (1965).

The mandate of *Green* was clearly satisfied in the present case. Each witness was placed under oath. Each witness was subjected to extensive cross-examination. Since Counsel was aware that the depositions would constitute actual trial testimony, the inquiry was far more searching than in the preliminary hearing stage about which the Court has expressed some concern. *See California v. Green,* 399 U.S. at 165; *Barber v. Page,* 390 U.S. 719, 725 (1968). Petitioner was in a control booth only a few feet away, and monitored both auditorily and visually everything that transpired. He was in constant communication with Counsel, thereby securing his right of participation. The witnesses were aware of his presence, and of his ability to see and hear them. Due to the high degree of audio and video clarity, both Petitioner and the jury were able to evaluate the demeanor of the witnesses.

Each of the purposes of confrontation was satisfied by the procedure used in this case, and the New Mexico Court of Appeals correctly held that Petitioner's confrontation rights were not abridged.

2. The New Mexico Court of Appeals Correctly Balanced the Rights of Petitioner with Policy Considerations Involved in Presenting the Testimony of Child Victims of Sex Offenses.

The Court has recognized that the right of confrontation is not absolute, and that countervailing considerations will sometimes prevail. In *Mattox v. United States,* 156 U.S. 237 (1895), the Court noted that

> general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.

Id. at 243; *see Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (right to confront not absolute; may bow to accommodate other legitimate interests). Based on this principle, the Court has approved the use of prior testimony at a subsequent trial. *E.g., Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (testimony from preliminary hearing); *California v. Green*, 399 U.S. 149, 165 (1970) (same); *Mancussi v. Stubbs*, 408 U.S. 204, 213-16 (1972) (testimony from prior trial); *Mattox v. United States*, 156 U.S. 237, 243 (1895) (same).

In the present case, the court of appeals recognized that the State has a strong interest in protecting child victims of sexual abuse from the further trauma of testifying in court. *See State v. Vigil*, 103 N.M. 583, 586, 711 P.2d 28 (Ct. App. 1985); *State v. Messier*, 101 N.M. 582, 586, 686 P.2d 272 (Ct. App. 1984). This policy is reflected by statute, N.M. Stat. Ann. § 30-9-17 (Repl. Pamph. 1984), and by court rule, N.M.R. Crim. P. 29.1 (Repl. 1985) (current version at N.M.R. Crim P. 5-504 (Recomp. 1986)). It is a policy whose legitimacy has been widely recognized. *E.g.*, Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977 (1969); Ordway, *Proving Parent-Child Incest*, 15 U. Mich. J.L. Ref. 131 (1981); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 806 (1985).

The New Mexico statute provides that the deposition shall be taken in the presence of the defendant. N.M. Stat. Ann. § 30-9-17 (Repl. Pamph. 1984). The rule provides that the defendant must be present. N.M.R. Crim. P. 29.1(B)(2) (Repl. 1985) (current version at N.M.R. Crim. P. 5-504 (Recomp. 1986)). The court of appeals determined that Petitioner's

presence in the control booth satisfied the terms "presence" and "present." (App. to Pet. for Writ of Cert. at 3). This interpretation of state law should not be disturbed by this Court. *Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n.*, 426 U.S. 482, 488 (1976). The court of appeals has previously upheld the constitutionality of the statute and rule to the extent that they provide for use of videotaped depositions of child victims of sex offenses. *State v. Vigil*, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985). Petitioner does not challenge the constitutionality of the statute or the rule, and contests only the procedure whereby the defendant is placed in a separate room during testimony.

Both the statute and the rule further provide that the defendant must be represented by counsel or waive counsel, and that he must be afforded an adequate opportunity for cross-examination. N.M. Stat. Ann. § 30-9-17(A) & (B) (Repl. Pamph. 1984); N.M.R. Crim. P. 29.1(B)(2) & (3) (Repl. 1985) (current version at N.M.R. Crim. P. 5-504 (Recomp. 1986)). The court of appeals reviewed the opportunity for cross-examination provided by this procedure, and reviewed the extensive testimony as to the mental or emotional harm that the children would suffer by testifying in the same room with Petitioner in a face-to-face setting. It held that the statute and rule, as applied, satisfied Petioner's confrontation rights, while also providing a reasonable manner in which the childrens' testimony could be presented. (App. to Pet. for Writ of Cert. at 6-7).

Based on the policy of balancing the need to protect the child victim of sex offenses with the need to ensure the right of confrontation, at least two jurisdictions have upheld procedures for videotaping testimony similar to those used in the present case. In *Commonwealth v. Willis*, 716 S.W.2d 224 (Ky. 1986), the Kentucky Court of Appeals upheld a statute pertaining to child sex abuse cases which permits the court to

obtain a videotaped deposition of the child where the defendant may see and hear the witness, but not be seen by the child. *Id.* at 228. The Kentucky statute specifically provides that the child shall be in a separate room, but that the defendant must be permitted to observe and hear the testimony of the child in person. Ky. Rev. Stat. Ann. § 421.350 (3) & (4). (1986 Cum. Supp.). Recognizing the necessity of the procedure and that it applies only to the narrow class of child victims of sex offenses, the court examined the confrontation provided to the defendant, and upheld the procedure:

> The videotaped or televised testimony under §§ 3 or 4 of the statute is not hearsay. It is the functional equivalent of testimony in court. The testimony is taken with the court, counsel and the defendant present in person. Full cross-examination is authorized. The defendant and the jury can see and hear the witness and assess credibility by observation of the demeanor of the witness.
>
> The motion to take the victim's testimony pursuant to KRS 421.350 does not limit the defendant's right to cross-examination in any way. He is not precluded from bringing out any evidence of hostility, bias or other motive for testifying or from otherwise attacking the credibility of the witness. The right of confrontation is fully protected as required by the constitution and RCr 7.12.

Commonwealth v. Willis, 716 S.W.2d at 228-29 (citations omitted). With the exception of the Kentucky statute's specific provision for separating the defendant and the witness, the statute is essentially the same as New Mexico's. The procedures followed are identical, and the interests of the defendant and the witnesses which the Kentucky court found to be fully served and protected were similarly served and protected in the present case.

In *State v. Sheppard*, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984), the court approved a closed-circuit television procedure. Under this procedure, the child would testify in one room in the presence of the attorneys, and the testimony would be received via monitors in the courtroom by the judge, the defendant, and the jury. Private communication would be provided between the defendant and his attorney, and an audio system would be provided for communication between the judge and the testimonial room. *Id.* at 1349. After an extensive review of decisions from this Court, the court determined that it must balance the potential trauma to the child with the right of confrontation:

> Great harm befalls the victims of child abuse. It destroys lives and damages our society. Known abusers are not being prosecuted because evidence against them cannot be presented. Children who are prevailed upon to testify may be more damaged by their traumatic role in the court proceedings than they were by their abuse. These considerations must be weighed and balanced against the right of confrontation in child abuse cases.

Id. at 1342. The court declined to require "eyeball-to-eyeball" contact, and found that the proposed procedure would enhance the quest for truth, without unduly infringing the right of confrontation. *Id.* at 1343-44; *cf. People v. Moran*, 114 Cal. Rptr. 413, 417, 39 Cal. App. 3d 398 (Dist. Ct. App. 1974) use of videotaped testimony from preliminary hearing); *Kansas City v. McCoy*, 525 S.W.3d 336, 339 (Mo. 1975) (En Banc) (closed-circuit testimony of expert witness in case involving violation of municipal ordinance). *See also* 5 Wigmore, Evidence § 1395 at 153-54 (Chadbourne Rev. 1974) (demeanor arises from witness' presence before tribunal, not from confrontation between defendant and witness); *The Supreme Court, 1969 Term*, 84 Harv. L. Rev. 1, 115 (1970) (factfinder's observation of witness' confrontation with defendant not constitutionally required).

Petitioner cites *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979) and *Herbert v. Superior Court*, 172 Cal. Rptr. 850, 117 Cal. App. 3d 661 (Dist. Ct. App. 1981). Both cases are distinguishable. As noted by the New Mexico Court of Appeals in this case, neither *Benfield* nor *Herbert* presented a strong showing of necessity for dispensing with the requirement of face-to-face confrontation. In *Benfield* the victim was an adult, and the charge did not involve sexual abuse. Furthermore, the defendant did not have audio contact with his attorney, and the witness was deceived as to his presence. *Id.* at 817. In *Herbert* no videotaping was involved. Rather, the court arranged for the child witness to testify out of sight of the defendant. Significantly, the record failed to demonstrate the need for the procedure employed. *Id.* at 855. The New Jersey court in *Sheppard* distinguished both *Benfield* and *Herbert*. *State v. Sheppard*, 484 A.2d at 1337-38. The Kentucky court in *Willis* distinguished *Herbert*, without mentioning *Benfield*. *Commonwealth v. Willis*, 716 S.W.2d at 230. The early case of *State v. Mannion*, 57 P. 542 (Utah 1899), is likewise distinguishable. The seating arrangement struck down by the Utah Supreme Court in that case had prevented the defendant from both seeing and hearing the child witness, from seeing all of the jury, and from communicating with his attorney during the witness' testimony. *Id.* at 542-43. Moreover, there was not a strong showing of necessity for protection of the child witness. *Id.* at 544.

By contrast, the record in the present case abundantly supports a finding of necessity for the procedure utilized. The court carefully balanced the need for protecting the children with Petitioner's right of confrontation. The degree of care is illustrated by the fact that one of the children was required to testify in open court, the court not finding that she would suffer unreasonable and unnecessary harm. The procedure employed completely satisfied Petitioner's right to confront the witnesses, and should be upheld.

Finally, Petitioner asks that this case be joined with *Stincer v. Commonwealth*, 712 S.W.2d 939 (Ky. 1986), *cert. granted*, No. 86-572. The State opposes this request on the basis that the issues are dissimilar. *Stincer* involves the exclusion of the defendant from a competency hearing. It does not involve actual trial testimony, or, as here, deposition testimony to be used at trial, and does not involve closed-circuit television or videotaped testimony in which the defendant can see and hear the testimony, as well as communicate with his attorney. As such, joinder is inappropriate, and will not serve to enhance consideration of either case.

REASONS FOR DENYING THE WRIT

The New Mexico Court of Appeals, by unanimous decision of the panel, correctly decided this case. The deposition procedure used to obtain the testimony of the child victims complied with the confrontation clause and satisfied its requirements as outlined by this Court in *California v. Green*. Each of the witnesses was placed under oath. Each was subjected to extensive cross-examination, and Defense Counsel was aware that the testimony would comprise actual trial testimony. The means of recording and reproducing the testimony provided both Petitioner and the jury with excellent opportunities to observe the demeanor of the witnesses. All of the elements of confrontation were thereby satisfied.

The New Mexico Court of Appeals also reached a fair result. By striking a proper balance between Petitioner's right of confrontation and the strong state interest in protecting child victims of sex offenses from the trauma of in-court testimony, the court fairly accommodated all interests.

Finally, the procedure used in this case is narrowly limited to a single class of cases. It applies only to children under the age of thirteen years who are victims of sex offenses. Based on

similarly narrow statutes, the courts of Kentucky and New Jersey have approved this type of procedure.

CONCLUSION

Petitioner has not stated any issues which warrant consideration by this Court. This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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